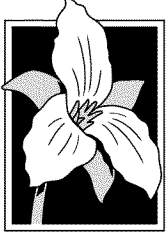


NORTHWEST ENVIRONMENTAL ADVOCATES



September 2, 2014

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Re: 2014 Final Draft Oregon Nonpoint Source Management Program Plan

Dear Mr. Yon:

How is it that DEQ could write so many words and say so little? What purpose is served by asking the public to wade through so many pages of nothing? What, precisely, is the point of this Nonpoint Source Management Program Plan other than just meeting EPA's demand for an updated plan? Plans, plans for more plans, reports on spending federal and state money to restore that which private landowners are not prevented from continuing to destroy...this plan is the epitome of bureaucrat nonsense. And, given that nonpoint sources are the primary source of so much of Oregon's water quality problems, it's a real picture of DEQ's fiddling while Rome burns.

Our bottom line is this: what is the point of spending taxpayers' money patching up a small number of stream miles when Oregon's regulatory program to protect and restore streams from nonpoint sources is an utter failure? It's like putting a band-aid on a scratch when the patient is bleeding to death.

I. What the Plan Should Look Like

DEQ has completely missed the point of issuing a nonpoint plan. For that reason we open our comments with a review of the statute and EPA guidance.

A. The Clean Water Act and EPA Guidance

Pursuant to Clean Water Act § 319(b)(1), Oregon is required to submit a plan to EPA for approval. The contents of this plan are governed by Section 319(b)(2). The plan is required to identify "the best management practices and measures which will be undertaken to *reduce pollutant loadings* resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B)[.]" CWA § 319(b)(1)(A) (emphasis added). These categories are designated in the report that was required to identify "those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) *in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements.*" CWA § 319(a)(1)(B) (emphasis added). Subparagraph (A) states that this report

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“identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, *cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter.*” CWA § 319(a)(1)(A) (emphasis added). In other words, the plan, of which this draft is one, required in section 319(b) requires the identification of BMPs that are sufficient to reduce the pollutant loadings identified in section 319(a) as contributing to violations of state water quality standards.

In addition to identifying those BMPs, DEQ is required to identify the programs it will use to implement these BMPs, CWA § 319(b)(2)(B), and to set out:

A schedule containing annual milestones for (i) utilization of the program implementation methods identified in subparagraph (B), and (ii) implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (1)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.

CWA § 319(b)(2)(C).

EPA’s most recent guidance sets out an update of the nine “key elements” that were discussed in its 1997 guidance. EPA, Section 319 Program Guidance: Key Components of an Effective State Nonpoint Source Management Program (Nov. 2012) (hereinafter “2012 Guidance”). With an eye towards the statutory requirements reviewed above, this 2012 guidance says this:

1. “The state program contains explicit short- and long-term goals, objectives and strategies to restore and protect surface water and ground water, as appropriate.” 2012 Guidance at 1. The annual milestones should be “specific enough for the state to track progress” and “describe outcomes and key actions expected each year[.]” *Id.* The objectives should include “both implementation steps and how results will be tracked[.]” *Id.*
2. “The state uses a combination of statewide programs and on-the-ground projects to achieve water quality benefits; efforts are well-integrated with other relevant state and federal programs.” *Id.* at 2. The programs include Total Maximum Daily Loads (TMDLs) and others. *Id.* at 2-3.
3. “The state program describes how resources will be allocated between (a) abating known water quality impairments from NPS pollution and (b) protecting threatened and high quality waters from significant threats caused by present and future NPS impacts.” *Id.* at 4. EPA states the program should address “the twin demands of remedying waters that the state has identified as impaired by NPS pollution and preventing new water quality problems from present and reasonably foreseeable future NPS impacts, especially for waters which currently meet water quality standards.” *Id.* The latter category would explicitly include waters covered by Oregon’s Protecting Cold Water Criterion for temperature. OAR 340-041-0028(11).
4. “The state program identifies waters and watersheds impaired by NPS pollution as well as priority unimpaired waters for protection. The state establishes a process to assign priority and to progressively address identified watersheds by conducting more detailed watershed assessments, developing watershed-based plans and implementing the plans.”

2012 Guidance at 4. This process should include a “variety of considerations,” *id.* at 4, which are enumerated by EPA, *id.* at 4-5, and which includes the “degree to which TMDL allocations made to point sources are dependent on NPS reductions being achieved,” *id.* at 5.

5. “The state implements all program components required by section 319(b) of the Clean Water Act, and establishes strategic approaches and adaptive management to achieve and maintain water quality standards as expeditiously as practicable. The state reviews and upgrades program components as appropriate. The state program includes a mix of regulatory, nonregulatory, financial and technical assistance, as needed.” *Id.* at 5. EPA has captured these requirements as follows:

(i) An identification of measures (i.e., systems of practices) that will be used to control NPS pollution, focusing on those measures which the state believes will be most effective in achieving and maintaining water quality standards. These measures may be individually identified or presented in manuals or compendiums, provided that they are specific and are related to the category or subcategory of nonpoint sources. They may also be identified as part of a watershed approach towards achieving water quality standards, whether locally, within a watershed, or statewide;

Id. In addition, EPA notes the statute requires “A schedule with goals, objectives, and annual milestones for implementation at the earliest practicable date[.]” *Id.* at 6. In short, EPA’s guidance reflects the statutory requirements.

B. Oregon’s Plan Ignores the Clean Water Act and EPA Guidance

As is pointed out in the specific comments below, it all boils down to this: nowhere in the plan does DEQ articulate what best management practices are necessary to reduce pollutant loadings from key categories of nonpoint sources to meet water quality standards, with and without TMDLs. Nor does DEQ establish a schedule with annual milestones for implementing these BMPs that reflects the earliest practicable date. It’s as simple as that. Until DEQ can clearly set out these BMPs, how it will achieve them, and when it will achieve them, the rest is just filler. That is, in this case, 77 pages of filler.

II. The Content of the Draft Plan

The comments below are set out in the order of the plan, with subject headings and page numbers.

2. Introduction

- pp. 13-14 The plan states that DEQ uses the list of enumerated “principles” to achieve its goals. Nowhere in this list of seven principles does DEQ state a commitment to using its regulatory authority to control nonpoint source pollution. The most it says is “[w]ork within our existing federal and state authorities,” which is simply a statement that DEQ will not exceed its authorities, not a statement that DEQ will use its authorities. The lack of reference to using its authorities makes this document an obvious sham.

- pg. 14 Carrying on the problem identified immediately above, this overview section of the role of TMDLs is laughable and points to why DEQ is wasting taxpayers' money working on TMDLs that supposedly seek to control nonpoint sources.
- Bullet 1 Why does DEQ need a guidance document to "identif[y]" the TMDL process? What does that even mean? What DEQ needs is a list of assumptions that are made in TMDLs that can be revealed to the public and be used to ensure that TMDLs across the state are consistent. For example, it is currently not possible to figure out which TMDLs make which assumptions about the temperatures of tributaries and there is no reason why these assumptions differ from one TMDL to another. But even providing the public with some information about how TMDLs are developed does nothing to identify the BMPs needed to meet the TMDLs and to implement those BMPs.
- Bullet 2 What does this mean that "TMDLs will be developed to address nonpoint source(s)"? Is this different from what TMDLs are or are not doing now? How precisely does DEQ intend to do this? Where is a schedule by which DEQ will identify the BMPs needed and when they will be implemented and how? How is this consistent with the statute or guidance?
- Bullet 3 How is this different from the second bullet and what does it mean? DEQ does not have the option of not including nonpoint sources when it develops a TMDL so what's the point of saying this other than to fill up space?
- Bullet 4 What does DEQ mean by "reasonable assurance"? Is this used as a regulatory term to mean that to allow wasteload allocations to point sources DEQ must demonstrate there is reasonable assurance that its load allocations to nonpoint sources will be met, consistent with 40 C.F.R. § 132.2(i) or is it just filler? Since DEQ does not provide any reasonable assurance now, how can it provide "better" assurance? And, more to the point, how can DEQ provide any reasonable assurance at all given that it does not intend to use any of its regulatory powers to achieve nonpoint source control? What is it planning to do that is going to be more successful than the non-success it has achieved to date?
- Bullet 5 How will DEQ "work[] with DMAs to assure they are meeting TMDL priorities"? First, what TMDL priorities? We are not aware of any TMDLs or WQMPs establishing priorities. Second, what specifically is DEQ planning on doing to meet these priorities with the DMAs? Third, what are the BMPs and the schedule for implementing the BMPs to achieve these priorities?
- Bullet 6 How will the "creation of partnerships between the federal agencies" lead to greater implementation of sufficient BMPs to meet TMDL load allocations?
- Bullet 7 How will identifying the "lead staff" at DEQ to "work with" state agencies "achieve consistency and efficiency"? More important, what do consistency and efficiency have to do with identifying the BMPs needed to meet load allocations in TMDLs and to get them implemented on as soon as practicable timeframe? How is "[i]dentify[ing] lead staff" sufficiently important to even end up in the plan? At this level of minutiae it is no wonder that DEQ never gets around to

identifying the BMPs necessary to meet load allocations.

- Bullet 8 Same comments as bullet four above regarding “better reasonable assurance” since DEQ currently provides no reasonable assurance. What specifically does DEQ have in mind for “additional analysis” that will “guide implementation for existing TMDLs”? What kind of additional analysis? Will this additional analysis lead to identification of BMPs necessary to meet load allocations? If so, when will this happen? If so, how specifically will this result in guiding implementation that is different from the non-implementation currently not taking place?
- Bullet 9 How does “building relationships with funding agencies” lead to implementing TMDLs? How will “high priority projects” been identified since no TMDL or WQMP currently identifies any priorities? What is DEQ talking about?
- pg. 14 What does DEQ mean by stating that “[i]mplementation on agricultural lands should be strategic and future actions should be documented in order to demonstrate accountability and to leverage various funding sources”? These are just words; how do they involve identifying adequate BMPs and getting them implemented? Does DEQ really believe that the main problem with agriculture is that progress had not been demonstrated? If so, on what basis does DEQ conclude that the issue is about demonstration rather than a wholesale failure to meet water quality standards or even to implement any BMPs to make progress towards meeting standards?
- pp. 14-15 How do all these bullet points together result in DEQ identifying sufficient BMPs, coming up with a schedule for their implementation, and getting them implemented?
- pg. 15 What does DEQ mean by putting in its plan this lofty goal: “Prevent, reduce, eliminate, or remediate nonpoint source water pollution and, where necessary, improve water quality to support beneficial uses on forestlands”? How is this a plan?
- How do any of the bullets regarding forestry result in identification of sufficient BMPs, a schedule for their implementation, and their implementation? It appears, instead, to leave DEQ in its usual subservient position with regard to the Department of Forestry, providing “assistance and comments,” “review[ing] any changes,” and the most obscure, “develop[ing] and implement[ing] MOAs or MOUs.” So, how does all this paperwork result in identification and implementation of sufficient BMPs to meet load allocations and water quality standards?
- pg. 16 DEQ asserts that “DEQ ... [u]ses TMDLs to establish NPS pollutant reduction goals.” There is absolutely no evidence that this statement is true. Not in this plan nor in any other document. Prove it or stop asserting it.
- pg. 16 DEQ states that “reduction in Oregon’s 319 funds from disapproval of the Coastal Nonpoint Control Plan (CNPCP) would affect DEQ’s ability to implement most,

if not all, of the NPS Management Program Plan (see Section 3.4.5 Coastal Zone NPS Management Program for additional information).” We suggest that instead of whining about the potential for federal agencies to follow federal law the way Congress intended, that Oregon use this Plan as an opportunity to spell out precisely how it will meet the requirements of CZARA such that it can keep its funds.

3. Oregon’s NPS Management Program

pg. 18 What is a Water Quality Restoration Plan (WQRP)?

pp 22-27 Items on these pages regarding the goal of “NPS Implementation” include collecting information and putting it in an annual report, at 23, and “[d]evelop[ing] a spreadsheet and process for DEQ to track and report on landscape condition for achieving TMDL implementation timelines and milestones including water quality status and trends,” and putting in an annual report, at 25. Neither one of these is about implementing nonpoint source controls but, rather, about gathering information.

In fact, there is nothing in this multi-page chart about implementing nonpoint source controls. On page 25, DEQ states that it will “[d]ocument definition of system potential and site capable vegetation,” and “[c]onduct effective shade assessments for evaluating implementation to achieve TMDL/WQS goals under area rules and plan.” This is not clear. The first apparently is that DEQ will document the meaning of Oregon Department of Agriculture’s patently inadequate rules. That’s nice but it is unclear what that will achieve and whether DEQ will be clear that the rules are, in fact, inadequate. DEQ’s unwillingness to tell-it-like-it-is is pathological and there is no indication that is going to change. Without change, business-as-usual continues with no reduction in nonpoint source pollution. The second item is more confused. Is DEQ stating that it will evaluate whether the ODA rules and plans are sufficient to meet water quality standards and TMDLs? Or will DEQ be in the field assessing the state of implementation of ODA rules and plans? Or will DEQ be in the field assessing compliance with temperature TMDLs? It is impossible to comment on such unclear language. And this is important. Is DEQ planning on doing something useful to control agricultural nonpoint source pollution? Or is this a dream?

pg. 26 This contains the statement that DEQ will work with ODA to “help develop assessment methodologies for addressing temperature, sediment and sedimentation, bacteria, nutrients, and pesticides.” What does this mean? It states that it is in the category of “ODA Area Rule Compliance” so one is led to believe that DEQ will help ODA figure out if farmers are in compliance with the inadequate ODA rules, rules that bear no relationship to water quality standards or TMDLs. What is the point and will this lead to identification of sufficient BMPs and their implementation?

DEQ says it will participate with ODF on new rules. What if ODF decides to not pursue new rules? DEQ also states it will participate with ODF in developing “evaluation methods and study designs” to address unanswered monitoring

questions, purportedly to “Meet TMDL Load Allocations and Water Quality Standards.” Will this address so-called non-fish bearing streams (Type N)? What timeframe is being contemplated for completion of this work? Why doesn’t DEQ use its TMDLs to determine this information? Will DEQ petition the Board of Forestry if working together is unsuccessful? What happens if there are no funding sources for this new information gathering process?

pg. 28 What is the basis for this absurd and delusional statement? “This infrastructure sets Oregon apart from other states through a direct linkage between plan and need development, funding mechanisms and subsequent monitoring.”

What is the point of filling up pages in this plan with identical lists of information? Perhaps to disguise, badly, the lack of substance?

pg. 29 DEQ sets out a list of MOAs with other agencies and proceeds to summarize their purported attributes. DEQ should, instead, explain in great detail how the MOAs connect the findings of TMDLs with changes in nonpoint source controls. A statement that asserts, *for example*, that an MOA with ODA leads to “collaborative efforts to meet their legal responsibilities related to agricultural NPS pollution, and to help ensure, to the maximum extent practicable, that agricultural activities in compliance with Area Rules do not cause or contribute to exceedances of water quality standards and that implementation of Area Plans TMDL allocations are achieved in agricultural areas,” is not helpful and is, in fact, misleading. DEQ should explain precisely how that MOA ensures that the ODA rules are adequate to meet standards and TMDLs. They aren’t and DEQ has said as much. But here, in the plan to make things better, DEQ backtracks and makes everything sound like it is under control. This is corrupt.

pg. 30 DEQ’s assertions about the link between TMDLs and forest practices has no basis in fact.

pg. 31 What is the meaning of “baseline” in describing “regulatory statutes”? This is meaningless jargon and should be stricken.

pp. 31-32 The discussion of water quality standards should be stricken. With the exception of the Protecting Cold Waters Criterion, water quality standards have no bearing on nonpoint source controls in this state and even that is in question. Therefore it is misleading to include this discussion as if they do or will in the foreseeable future.

pg. 32 Ditto with regard to the 303(d) list and 305(b) report.

pg. 33 Ditto with regard to TMDLs. It is factually wrong to state that “load allocations for nonpoint sources ...are ... implemented through the WQMP and TMDL Implementation Plans, Agricultural Area Rules and Plans, Forest Practices Act, Water Quality Restoration Plans, and other planning documents.” If DEQ is convinced this is true, then explain how it is. There is, in fact, no evidence that a TMDL has had a single impact on nonpoint source controls; therefore they are not “implemented” with regard to nonpoint sources. They simply gather dust on

shelves. DEQ doesn't even use them for some NPDES permits!

The same is true of the following related statements: "Working with ODA staff to implement the Agricultural Water Quality Management Act to implement the TMDLs effectively on agricultural lands," "Working with the ODF staff for implementation on state and private forestlands, through the Oregon Forest Practices Act and long-range management plans," and "Working with ODA and ODF to implement their programs to meet TMDL allocations." DEQ certainly works with ODA and ODF staff. DEQ does not work with them to implement TMDLs. The TMDLs are wholly irrelevant to any programs that the state has in place to do something about nonpoint source pollution.

pg. 34 See below.

Bullet 1 DEQ guidance documents are notorious for the their process. Either DEQ is going to take a lot of EPA guidance documents and then delete some of the text and create a so-called Internal Management Directive that says nothing useful or it will make up policy out of thin air, policy that usually will be proven to be inconsistent with federal law. How is this guidance document going to lead to an change in nonpoint source pollution control? Will it identify BMPs necessary to meet load allocations and establish how they will be implemented?

Bullet 2 What is the point of saying this? All TMDLs have to address nonpoint sources.

Bullet 3. How can DEQ provide "better reasonable assurance" without having any facts to base such assurance on? How can it do something better that it's never done at all?

Bullet 4. What is a "TMDL priority"?

Bullet 5. What is the point of "consistency and efficiency" when no agency involved wants to change the status quo and the status quo is what is causing the impairment in the first place?

Bullet 6. What is the "additional analysis" needed to "guide implementation for existing TMDLs"? This could be the single most important line in the entire plan and yet it says almost nothing. What is DEQ talking about doing?

Bullet 8. How is "measur[ing] and track[ing]" a form of implementation?

pg. 34 This section on general permits for pesticides is pointless. Why does it not discuss the fact that the public has no ability to participate in permit coverage under the this permit or even obtain information about who is authorized to discharge under it? Why is there no cross-connection between Endangered Species Act consultations on EPA's authorizations under FIFRA mentioned here?

pg. 35 There is no connection between the Basin Reports and nonpoint source control any more than between TMDLs and nonpoint source control. If DEQ thinks otherwise, it should provide some examples. It's nice that these plans

“[e]ncourage all involved to be flexible” but that has to be one of the more stupid things DEQ has ever said. Yes, by all means, let’s introduce *more* flexibility into our non-existent nonpoint source control program.

pg. 36 DEQ asserts that it has “developed a comprehensive, integrated approach to address toxic pollutants in the environment. An integrated approach is essential because these pollutants readily transfer from one environmental media to another (e.g., mercury can be released to the air, deposit on the land, and run off to the water). DEQ’s cross-media toxics reduction strategy is meant to ensure that DEQ is addressing the problem of toxics in the environment in the most effective and efficient way.” This is an unpardonable lie. Has DEQ engaged in some pollution prevention approaches, such as collecting old pesticides? Yes. Is this something that could be described as an “integrated approach” that addresses cross-media concerns? No! Where, other than in the analysis portion of the Willamette mercury TMDL has DEQ taken a cross-media approach? Having determined the vast majority of that river system’s mercury comes through forestry and agriculture, from air deposition sources, has DEQ increased controls on land disturbing activities? Of course not!

DEQ relies on the following three items to prove its point: (1) reducing toxics in retail products, (2) green chemistry, and (3) state purchasing guidelines. DEQ should explain how, precisely, this results in less nonpoint source pollution or delete it. At a minimum, janitorial supplies generally go down sewer pipes, which are point sources.

pg. 37 The Pesticide Stewardship Partnerships are good but they are not a substitute for other approaches as well, including implementation of the restrictions mandated by the National Marine Fisheries Service biological opinions on certain pesticides (required as of early this week for some pesticides). This plan also should address the limitations inherent in the Pesticide Stewardship Partnerships, that is the places where DEQ has identified that they cannot work (e.g., crops are too diverse and therefore pesticides used are too diverse). DEQ should also discuss that one significant way to prevent pesticides from entering Oregon waters, besides not using them or using less of them, is by maintaining the forested riparian buffers that the state also needs to protect streams from temperatures and sedimentation and other pollutants, such as mercury – see the Willamette Mercury TMDL.

pg. 38. DEQ mentions CWA and FIFRA but not ESA. Discussion about use of actual regulatory options is missing.

pp. 38-39 Strategies, data, maps, GIS data, inventories, databases ... these do not protect drinking water from nonpoint source pollution. Here’s a bulletin: only controls on nonpoint sources protect drinking water.

pg. 40 It’s nice that DEQ has an “objective of protecting groundwater” but when it encourages and/or allows the distribution of sewage sludge, manure, and excessive fertilizer and wastewater over lands, calls for discharge of municipal sewage to groundwater and hyporheic flows, clearly DEQ’s method of protecting is to allow pollution and wait until groundwater is contaminated. Then it can try

to come up with a plan to stop additional groundwater pollution in its usual ineffectual way. It's a strategy, just not a good strategy.

- pp. 41-43 More whining. At least be accurate in your description of the proposed federal action and include concerns about agriculture. Maybe you would like to include here how DEQ had a plan but backed out of it? (Midcoast TMDL). Maybe you want to talk about how so-called non-fish bearing streams have no protections? And small and medium sized fish-bearing streams still don't have protection? Claiming credit for rules that were adopted in 2003 shows how pathetic DEQ's effort has been.
- pg. 43 The comment that there is a commitment to determine the effectiveness of ODF rules should be amended to note that that may be true so long as nobody questions the standards or the 303(d) listings.
- The reference to enhancement of landslide protections is misleading. It is unclear to what extent this enhancement was done and the experts have dismissed this so-called enhancement as ineffectual to address large wood deficits and to mitigate risk of landslides on clearcut slopes.
- Current Board of Forestry consideration of rulemaking is too little, too late. After three years, it is not done and there is no plan to address so-called non-fish bearing streams or waters in Eastern Oregon. What does DEQ plan for that?
- How much of the \$93 million purportedly spent on voluntary measures to address older roads was for environmental restoration versus for improvements so that roads could be used? To what does DEQ refer when it states that there are restrictions on delivering sediment to streams from older roads?
- Is DEQ suggesting, through its reference to Oregon's "strong land-use system" that protecting "working forestlands" makes acceptable polluting streams that flow through these forested lands? If so, please so state. And for whom do these "working forestlands" work? For the fish, the people who fish, amphibians? Being smug is not planning for the future; it's simply defending the status quo.
- pp. 44-46 Page 44 summarizes EPA's "Nine Key Elements," which are set out in EPA's guidance. On the next page, however, is a chart of a different set of nine key elements that does not correspond to the ones set out on page 44. Instead, that list comes from the EPA Handbook for Developing Watershed Plans to Restore and Protect Our Waters (March 2008), which is cited but has the wrong hyperlink. It is unclear what the purpose of the colorful chart is – particularly considering that *it has no substantive value whatsoever* – when a simple outline would be easier to read. It is even more pointless to summarize EPA's 400-page guidance document in this chart considering that (1) DEQ's response to the chart is to state that yet another chart, Table 3 in the plan, "will be included in the guidance for each example plan and report." What is an "example plan and report"? And if this is going to be put into as-yet-unwritten guidance, why is DEQ spending pages of this plan saying that it isn't doing anything with the content now? And, more important, how is filling out this Table 3 chart in the future indicating now how

the nine key elements are being met? *See* page 46 (“The filled –out chart will also indicate how the Oregon NPS Program Plan’s goals, actions, milestones and planned actions with associated timelines (i.e. the nine key elements) are or are not included in the TMDL Implementation Plans and Watershed Approach Basin Reports.”). And, most important, how does any of this relate to identifying the necessary BMPs and getting them implemented?

DEQ appears to be stating that filling out the chart with a “Yes or No” answer will somehow demonstrate that its watershed planning and TMDLs are meeting EPA’s key elements. Nothing could be farther from the truth. Instead, DEQ is playing a paperwork game, seeing how many checklists it can create that link one pointless document to another. DEQ has not explained how all this paperwork leads to one iota of nonpoint source control. DEQ has also not discussed the nine key elements of the 2012 EPA guidance.

4. Management of NPS by Land Use

pg. 48 The statement “[w]ater quality standards and TMDL load allocations for agricultural lands should be met through implementation of area plans and enforcement of area rules” is utterly unhelpful. This plan is not supposed to be an updated recitation of the same junk set out in the last plan. It should, instead, explain what is working and what is not and what DEQ is going to do about it. Are the standards and TMDL load allocations being met by the ODA plans and rules? If not, why not? And what will DEQ do? A recitation of all the paperwork that the agencies have completed has nothing to do with whether BMPs have been established that are adequate to meet standards and load allocations and whether those BMPs are being implemented.

pg. 49 Reciting what an area plan “must” do is irrelevant to whether it is adequate. Specifically, since the ODA area plans “describe pollution prevention and control measures deemed necessary by the Oregon Department of Agriculture (ODA) to achieve the goal,” and this 319 Plan is DEQ’s plan, it is DEQ’s job to assess here whether the control measures deemed necessary by ODA are, in fact, sufficient to meet standards and TMDLs. Moreover, DEQ should discuss, here, whether voluntary plans are adequate to ensure implementation of those controls.

To what is DEQ referring when it states that an area plan must “[i]nclude an implementation schedule for measures needed to meet applicable dates established by law.”

And what is DEQ’s assessment of how well this element of ODA plans is working: “a strategy for ensuring that the necessary measures are implemented.”

pg. 49 Likewise, how well are these MOA elements working: “Support ODA to develop and implement AGWQMP area plans that would, when implemented, achieve TMDL load allocations and water quality standards including groundwater”: “Support ODA to develop and ensure compliance of AGWQMP area rules that would, when implemented, help achieve TMDL load allocations and water quality standards.” Why does DEQ evaluate forest practices BMPs but does not do the

same for agriculture?

- pg. 50 This section is entitled, *inter alia*, “TMDL Implementation.” How does “measur[ing] and report[ing]” “improve water quality on agricultural lands,” as asserted in the text? Specifically, how does the preparation of annual report, DMA reporting, documenting implementation actions with ODA, etc. actually result in any control of nonpoint source pollution coming from agricultural lands? Where in this section does DEQ explain how it will be implementing TMDLs on agricultural lands? Is that the part where DEQ says it “*could* include DMA reporting”? How is a possible but not actual reporting going to reduce water pollution?
- pg. 51 How does DEQ view ODA’s “pre-assessment to identify locations likely not meeting water quality regulations”? We already know that ODA’s notion of what is adequate to meet water quality standards is not adequate from DEQ’s perspective. So, why doesn’t this plan acknowledge that difference and discuss what DEQ is going to do about it instead of pretending that DEQ and ODA are in lock step?
- pg. 51 Repeating that DEQ considers ODA’s plans and TMDLs to be “key program[s]” is not helpful to understanding how DEQ uses those to ensure nonpoint sources are controlled sufficiently to meet water quality standards and load allocations. As with all the other references to DEQ’s plan to publish a TMDL guidance document, it is unclear why this will be helpful. What gap does DEQ intend to fill that EPA’s TMDL guidance does not? How will the development of guidance enhance the ability of TMDLs to actually control nonpoint sources on the ground? This is just filler and plans to increase make-work to avoid doing real work.
- pp. 51-52 This is all repeated material, none of which explains how these various items will result in increased nonpoint source control.
- pg. 53 Nothing in this discussion of ODA information gathering explains how this information gathering will increase nonpoint source control or will be used in the future to enhance that control.
- pg. 54 What is DEQ going to do with its jurisdiction that stems from the need for additional protections required by the Clean Water Act? What is the purpose of reciting provisions of state law that DEQ intends to never use? Perhaps DEQ could explain in this plan why it has not used these provisions.
- DEQ should explain the meaning of this obviously factually incorrect statement: “The FPA Rules and Best Management Practices (BMPs) protect natural resources including water quality.” At a minimum, and only a minimum, the finding of degradation made by the Board of Forestry concerning the impact of logging on attainment of the Protecting Cold Water Criterion is a demonstration that the BMPs do not, in fact, protect water quality. So why is this statement here? What about the TMDLs? Have they also found that FPA BMPs are protecting water quality sufficiently?

Instead of reciting how everything is supposed to work, DEQ should discuss how it sees the relationship of TMDLs which uniformly conclude that all nonpoint sources are contributing too much temperature to Oregon's impaired waters and the forest practices which are not adequate to fix that. It is absurd to have a Plan that keeps referencing the amazing role that TMDLs play in Oregon's nonpoint source controls when there is zero evidence that either DEQ or ODF take TMDL load allocations to forestry into account when establishing BMPs for forestry.

pp. 55-56 DEQ should use this discussion on Ripstream to explain how it does or does not work with the findings of DEQ's completed TMDLs. Are the TMDLs irrelevant? Why did DEQ allow Ripstream to move forward without sufficient sites on so-called non-fish bearing (Type N) streams? Why did DEQ allow Ripstream to move forward without any sufficient sites on impaired streams? How does Ripstream address cumulative impacts of multiple logging sites? What does DEQ make of the 3 of 18 stream reaches that did exceed numeric criteria after harvest? How does that information link with TMDLs? Why does DEQ draw a conclusion about meeting the Protecting Cold Water Criterion for fish-bearing streams but not on so-called non-fish bearing streams? How do they differ in terms of the physics of warming?

Why is DEQ limited to using "existing ODF processes" to evaluate the sufficiency of logging practices for "small non-fish-bearing streams, landslide-prone areas, sediment processes, pesticides, and drinking water protection"? Why aren't DEQ processes of any value? And what is the reference to "MidCoast TMDL work" here? How is DEQ using the MidCoast TMDL to evaluate forest practices? How is it helpful to throw in this reference without explaining it? How does the Ripstream outcome on state lands square with the TMDLs that have been completed that include state lands?

Using bullets and then referencing them by number is not helpful.

pg. 57 This list is the most concrete in the entire document but it fails to address the findings of DEQ's own TMDLs and their relationship to forest practices. It is also obscure (e.g., reference to "remaining water quality risks and impacts"). And it is uninformative: "Continue working with ODF to ensure that water quality standards are being met with regard to small nonfish-bearing streams, landslide-prone areas, sediment processes, pesticide use, and drinking water sources on nonfederal forestlands." This is just another way of saying, we're doing what we're doing and we're not telling you. What kind of plan is that?

pp. 57-58 What is the point of summarizing the MOAs? Why not just attach them and let the reader decide what they do or do not mean? Use this space to discuss the outcomes: were BMPs developed and implemented that are sufficient to meet water quality standards and load allocations? If not, why not? Are the MOAs deficient or just their implementation? Don't just say that the MOA requires BLM to do monitoring; what does the monitoring tell us about the key issues? What have DEQ reviews concluded to date and what is DEQ doing to address the results?

- pg. 59 What is the point of a “priority” that states “[p]revent, reduce, eliminate, or remediate point and NPS water pollution and, where necessary, improve water quality to support beneficial uses”? How is that a priority in a plan that is ostensibly about *that entire subject*? How is “cooperat[ing] on priorities” a priority? How is it helpful to state that a priority is the “implement[ation] [of] ... practices that collectively ensure attainment of Federal and State water quality standards and TMDL load allocations”? What are the practices and how will they be implemented and how is that a priority in a document that pretends to focus on the use of TMDLs to control nonpoint sources? How will TMDLs be used to determine what those practices should be? Other than the closure of roads and restoration of riparian habitat and wetlands, how will priorities be established within those lands?
- pg. 60 How will DEQ evaluate the BLM revised RMPs? How will TMDLs and water quality standards come to bear on that review?
- pg. 61 Why take so much time explaining about the National Core BMPs only to conclude that they are “general and non-prescriptive” and that they “require the development of site-specific prescriptions”? Why is this plan referencing itself? Is this an actual plan or is it just public window-dressing (*see, e.g.*, “The federal CWA does not regulate NPS pollution.”)? Why is all this general material here, deep in the document, in lieu of an explanation of how the site-specific BMPs are developed.
- pg. 62 Why include BMPs for roads but not for riparian protection? Why not compare the federal BMPs for roads with that used on private forest lands?
- pg. 63 If DEQ is relying on TMDL implementation plans, why not tell the reader how well that has been working. Are these plans resulting in any changes in nonpoint source controls? If so, please point them out. What contribution does DEQ review provide to these plans? What gaps are there? Are the plans being implemented? Does any of this result in anything? If so, tell us. If not, explain what DEQ will do about it. It is not helpful to report that Stormwater Management Plans “must include BMPs ... that are necessary to make progress towards achieving the applicable TMDL and wasteload/load allocations. The question is not whether they “must,” as that is a matter of law. The question is whether the BMPs are adequate, whether they are being enforced, and what DEQ means when it says “make progress towards.”
- pp. 63-64 It is unclear what purpose this discussion serves.
- pg. 65 Speaking of DMAs, the plan states that “the [Goal 5] ‘safe harbor’ buffer widths may not provide sufficient shade to meet the temperature TMDL shade surrogates in some instances. A local jurisdiction may determine that they comply with Goal 5 and not Goal 6 or their TMDL.” It is unclear why DEQ notes that a Goal 5 buffer width may not be sufficient to meet TMDLs but DEQ has made no observation at all about agricultural buffer widths, to the extent they even exist (they don’t). DEQ wears its fear of the Agricultural Lobby on its sleeves.

pg. 66 DEQ's recitation of 319 funding is not helpful in stating its plans for the future. In addition, to be useful, DEQ could reflect on the success of all this funding. Say, perhaps, DEQ could tell us about efforts it has made to go back and check to see what restoration funded with taxpayers' money remains functional. And if not much is, what lessons were learned, if any.

pg. 67 What is the point of enumerating past FTE supported by EPA funding? Why not pick, if there are any, the activities supported by EPA that directly led to reductions in nonpoint source pollution. Are there any?

pg. 68 What in all of this pertains to ensuring that sufficient BMPs are identified and implemented? The only one that comes close is "[d]emonstration of innovative BMPs" and that is all there is on the subject. The rest is business-as-usual.

pg. 69 What does past funding have to do with future plans to control nonpoint source pollution?

The plan states that

Oregon DEQ reports annually to EPA the progress in meeting milestones, including:

- C Estimates of loading reductions of NPS pollutants
- C Improvements to water quality achieved by implementing NPS pollution control practices

It does not, however, provide any location for this information. Nor does it establish how DEQ comes by this information. Nor does it project into the future how its new plan will do better. Nor does it present the information in a relative fashion, e.g., whether it represents progress as compared to the amount that is needed to be reduced and how much degradation has occurred elsewhere because there are no nonpoint source controls.

pp. 70-76 It is unclear what this recitation of funding sources means for increased nonpoint source controls in the future.

pp. 77-78 It is unclear what this list of monitoring efforts means for increased nonpoint source controls in the future.

Conclusion

This document is one of the biggest pieces of garbage that DEQ has published in years.

Sincerely,



Nina Bell
Executive Director